

State of Alaska FY2007 Governor's Operating Budget

Department of Natural Resources RS 2477/Navigability Assertions and Litigation Support Component Budget Summary

Component: RS 2477/Navigability Assertions and Litigation Support

Contribution to Department's Mission

To defend and assert the State's ownership and rights to navigable and public waters and to trails established under federal Revised Statute (RS) 2477, thereby allowing access for economic development and use of the state's land and resources.

In FY07, DNR will continue to assert state ownership of navigable waters through the federal Recordable Disclaimer of Interest process. In FY07, DNR will also support the Attorney General's Office in litigation (Quiet Title) against the federal government to secure state ownership of two RS 2477 trails in Northern Alaska.

Core Services

NAVIGABILITY

This component funds three closely related projects: 1) ongoing identification and assertions of navigable waters and public rights to navigable and public waters; 2) a one-and-a-half year project to catalog navigable waters as called for in SB 305; and 3) applications to the US Bureau of Land Management (BLM) for Recordable Disclaimers of Interest for navigable waters. All three programs are part of the State's effort to identify and assert State ownership of navigable waters.

Identification and assertions of navigable waterways. The State owns the beds of most navigable waters in Alaska. Determining whether or not a waterbody is navigable is generally fact specific. In addition, federal and state criteria for navigability differ significantly. As a result, there is no easy method to conclusively determine what water bodies are navigable and therefore owned by the State, and there is no easy method to settle title disputes concerning navigable waters. Until 2003, the only method to resolve this question was for the State to file Quiet Title action in the courts, usually against the federal government. Quiet Title has been established for only 13 waterbodies statewide. Since 2003, the state and federal governments have agreed to use Recordable Disclaimer of Interest to determine navigability for title purposes for specific waterbodies (see further discussion below).

Navigability determinations for specific waterbodies are performed by DNR for a variety of reasons, including: making navigability determinations for state conveyances and projects on state lands; providing information to the public and agencies regarding the location and public rights to navigable and public waters; researching and other work to support litigation asserting state ownership; maintaining and updating data bases, files and maps of state owned navigable waters; and reviewing federal plans to assure that state ownership of waterbodies and public use are protected.

Mapping of all navigable waterways. In 2004, the legislature (through Senate Bill 305) directed and funded DNR to identify and prepare maps of waters already determined navigable by the State or federal government. This effort was intended to take one-and-a-half years and started mid FY05. DNR is continuing this project in FY06.

In FY 07, this component includes researching, preparing and filing applications with the Bureau of Land Management (BLM) for Recordable Disclaimers of Interest for navigable waters. This effort is partially funded through federal funds provide from the BLM. In addition to populating the navigability map through the submission of RDI applications, DNR intends to conduct research on other waterbodies and, utilizing State navigability criteria, make determinations in order to provide additional information on navigable waterways in the State.

Recordable Disclaimers of Interest. In January 2003, the Department of Interior adopted new regulations that allow BLM to issue Recordable Disclaimers of Interest for navigable waters. Rather than requiring that the State initiate a Quiet Title Action on each waterway, under these new regulations, the State must submit an application to the BLM requesting that the BLM issue a document stating that the federal government disclaims any property interest in the waterway. To date, the State has applied for RDI determinations on 26 rivers and 15 lakes. As of October 2005, the BLM had issued seven disclaimers for fifteen rivers and eleven lakes, including Lake Iliamna, the largest lake in Alaska.

DNR, working with the Department of Fish and Game (ADF&G) and the Attorney General's office, intends to file approximately 50 to 100 additional applications in FY06, including numerous streams in the Tanana, Kuskokwim and the Copper river basins. To prepare these applications, DNR will be required to conduct extensive research into the historical use, hydrology, and land status of each waterbody. Maps and a legal description must be prepared for each waterbody. Finally, once an application is submitted to the Department of Interior, DNR and ADFG staff must respond to requests for additional information from BLM, review and comment on the draft report issued by BLM (at times these reports have been up to 50 pages in length) and respond to numerous public inquiries about the applications. DNR must also pay for BLM's processing costs and publish and pay for public notices.

The number of waterbodies that the state will apply for will depend on several factors, including: 1) after research, what information is available to support an application - if data is not readily available fewer applications can be filed as staff will need to conduct more extensive research; 2) the complexity of the waterbody, for example, preparing the map and legal description for the Yukon River will be time consuming due to the length of the river; 3) the relative degree of cooperation the State receives from the Department of Interior; and 4) the level of controversy associated with the State's applications. This controversy can result from issues raised by the public, upland land owners and federal agencies with upland ownership of lands surrounding the waterbodies.

Under an Assistance Agreement, the BLM has funding available to work with DNR to conduct research on areas of the State where information is scarce, or where prior regional investigation reports have not been compiled. While this funding cannot be used to support the processing and filing fees that must be submitted with RDI applications, the research reports resulting from the Assistance Agreement will allow the filing of RDI applications in these areas to occur at a significantly increased rate.

RS2477

This component includes \$120,000 to continue research, mapping, and field work to support litigation with the federal government and \$40,000 to fund DNR's ongoing activities associated with RS2477 research, management and litigation. Since 1992 (when DNR received a CIP to research RS 2477s), the Division of Mining, Land and Water has researched more than 1900 routes, identified approximately 649 routes as routes qualifying as RS2477s. In FY07, DNR will continue to research into specific RS 2477s, will provide litigation support to the Attorney General's office, will maintain RS 2477 databases, and will respond to public and agency requests for information about RS 2477s.

RS 2477 trail management, including researching easement vacation requests, is funded through and will be done primarily as part of the Division's ROW and easement programs.

FY2007 Resources Allocated to Achieve Results

FY2007 Component Budget: \$458,600

Personnel:

Full time	2
Part time	0
Total	2

Key Component Challenges

Navigability. The issue of navigability determines who owns and manages the land under waterbodies in Alaska. Under federal law, if waters are determined navigable, this automatically means (unless they were withdrawn before Statehood) that the state owns their beds. However, there have never been determinations on whether or not most waterbodies were navigable at statehood. Only thirteen waterbodies in Alaska have navigability determinations that have been endorsed by federal courts, out of thousands of rivers and streams and hundreds of thousands of lakes.

The State has achieved a series of favorable court decisions on criteria for determining the navigability of Alaskan rivers. However, progress has stalled in getting the Solicitor to direct US Bureau of Land Management to apply these criteria and to re-determine decisions made before these court decisions. Litigating each water body is too slow and costly.

In 2003, the Department of Interior adopted new regulations that allow BLM to issue Recordable Disclaimers of Interest for navigable waters. The State applied for such determinations on 26 rivers and 15 lakes since FY04. In October 2003, BLM issued the first ever of these Disclaimers to the state for the Black River in NE Alaska, and has subsequently issued seven disclaimers for fifteen rivers and eleven lakes.

The department will continue pursuing additional applications for Recordable Disclaimers of Interest for navigable waters. To continue this effort in FY07, DNR must pay the processing and filing fees for the increased quantity of applications to be filed in FY07. These fees may not be paid by funds received from BLM.

RS 2477 Management. The RS 2477 program in general is an ever-increasing and inadequately funded workload. Conflicts among users and landowners of the more than 650 known RS 2477 rights of way absorb staff time to resolve. In addition, the law requires that DNR use great care in vacating an RS 2477 right of way (including most section line easements). In practice, this often involves lengthy interviews with landowners, surveyors, and other interested parties to determine whether evidence indicates that a public right exists, how certain the physical location is, whether a survey needs to be performed, and whether the owners need a realignment of the right-of-way (on their property) or to vacate the easement altogether. The vast majority of state time resolves problems for individual landowners, but has little ultimate effect on providing access for the development of state resources. This ongoing management is not funded by this component and is inadequately funded in the other components.

RS 2477 Assertions. In FY05, DNR began research necessary to support the state's Quiet title assertion to establish state ownership of two RS 2477. To continue this effort in FY07, DNR requires additional funds to support the Attorney General's office in this litigation and on other possible RS 2477 legal actions. Additional work may include contractual work required to produce expert witnesses, surveys, and further historical documentation. DNR's existing RS 2477 appropriation is not sufficient to fund the support work needed for the existing assertions through the federal courts.

Potential Legal Impediments to Navigable Waters and RS 2477 Assertions. RS 2477 and Recordable Disclaimers of Interest (RDI) are contentious issues at the national political level. As noted above, the state intends to use the RDI process to assert ownership of navigable waters. Secretary of Interior Norton has specifically rejected the state's request to apply the RDI process to RS 2477 routes in Alaska. Litigation could also limit the effectiveness of any efforts to work with the Department of Interior to make progress on navigable waters issues. Any of these factors could result in the need to redirect the state's efforts on these issues.

Significant Changes in Results to be Delivered in FY2007

DNR is requesting additional funding to support RS 2477 litigation and authority to receive additional federal funds to support the navigability program in FY07. As a result of the increased funding for RS 2477, DNR and the Attorney General's office intend to advance litigation for two RS 2477 routes in the Coldfoot and Chandalar Lake area of northern Alaska. Regarding the navigability program, DNR anticipates filing additional applications for Recordable Disclaimers of Interest (RDI) for 50-100 additional waterbodies and to receive from BLM RDIs for 10-20 water bodies.

Major Component Accomplishments in 2005

RS 2477

1. Conducted extensive research on more than twenty RS 2477 routes to identify candidates for pursuing through Quiet Title against the federal government. Selected three routes in the Coldfoot and Chandalar Lake area for assertions in court through Quiet Title. Department of Law filed complaints for only two of the routes as one of the routes was later determined to have excessively complex land ownership issues.
2. Researched many other RS 2477 routes where access issues and problems surfaced, including one route at Tolsona Lake that provides access to public waters and one in Fairbanks that was obstructed by a private property owner. The Tolsona issue has been resolved after lengthy negotiations, whereas the one in Fairbanks is in appeal status over the state's right to remove the obstructions.
3. Reviewed all state and federal land conveyances for RS 2477/17(b) conflicts.
4. Reviewed requests for RS 2477 easement vacations to ensure viable alternative access is provided.

Navigability

1. Filed application with US BLM for a Recordable Disclaimer of Interest (RDI) for 26 rivers and 15 lakes since

FY04. As of October 2005, the BLM had issued disclaimers for seven disclaimers for fifteen rivers and eleven lakes, including Lake Iliamna, the largest lake in Alaska.

2. Worked with BLM to develop a process for submitting and processing RDI applications. This is the first such process in the nation where the federal government and a state are resolving ownership of navigable waters through use of Recordable Disclaimers.
3. Issued navigability determinations for various bridge, road, and other development projects and made navigability determinations for state land conveyances to municipalities and private parties.
4. Reviewed and responded to BLM navigability determinations and proposed BLM land conveyances.
5. Assisted the Attorney General's Office in research related to administrative appeals and litigation regarding navigable waters
6. Provided information to agencies and the public on the navigability of waterbodies. Responded to requests submitted by phone, e-mail, navigability website, letters, etc.

Statutory and Regulatory Authority

AS 19.30.400

AS 38.05

11 AAC 51

Contact Information

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**RS 2477/Navigability Assertions and Litigation Support
Component Financial Summary**

All dollars shown in thousands

	FY2005 Actuals	FY2006 Management Plan	FY2007 Governor
Non-Formula Program:			
Component Expenditures:			
71000 Personal Services	120.0	207.6	182.4
72000 Travel	1.5	19.7	19.7
73000 Services	112.2	159.5	244.5
74000 Commodities	3.6	13.0	12.0
75000 Capital Outlay	0.0	0.0	0.0
77000 Grants, Benefits	0.0	0.0	0.0
78000 Miscellaneous	0.0	0.0	0.0
Expenditure Totals	237.3	399.8	458.6
Funding Sources:			
1004 General Fund Receipts	167.7	399.8	458.6
1007 Inter-Agency Receipts	69.6	0.0	0.0
Funding Totals	237.3	399.8	458.6

Estimated Revenue Collections

Description	Master Revenue Account	FY2005 Actuals	FY2006 Management Plan	FY2007 Governor
<u>Unrestricted Revenues</u>				
None.		0.0	0.0	0.0
Unrestricted Total		0.0	0.0	0.0
<u>Restricted Revenues</u>				
Interagency Receipts	51015	69.6	0.0	0.0
Restricted Total		69.6	0.0	0.0
Total Estimated Revenues		69.6	0.0	0.0

**Summary of Component Budget Changes
From FY2006 Management Plan to FY2007 Governor**

All dollars shown in thousands

	<u>General Funds</u>	<u>Federal Funds</u>	<u>Other Funds</u>	<u>Total Funds</u>
FY2006 Management Plan	399.8	0.0	0.0	399.8
Adjustments which will continue current level of service:				
-FY 07 Wage Increases for Bargaining Units and Non-Covered Employees	3.8	0.0	0.0	3.8
-FY 07 Health Insurance Cost Increases for Bargaining Units and Non-Covered Employees	0.5	0.0	0.0	0.5
-FY 07 Retirement Systems Cost Increase	6.2	0.0	0.0	6.2
Proposed budget decreases:				
-Third Year Fiscal Note: Asserting State Title to Submerged Lands CH42 SLA2004 SB305	-53.0	0.0	0.0	-53.0
Proposed budget increases:				
-Operating Support for Public Access Assertion and Defense section	100.0	0.0	0.0	100.0
-Risk Management Self-Insurance Funding Increase	1.3	0.0	0.0	1.3
FY2007 Governor	458.6	0.0	0.0	458.6

**RS 2477/Navigability Assertions and Litigation Support
Personal Services Information**

Authorized Positions			Personal Services Costs	
	<u>FY2006</u> <u>Management</u> <u>Plan</u>	<u>FY2007</u> <u>Governor</u>		
			Annual Salaries	116,296
Full-time	2	2	COLA	3,122
Part-time	0	0	Premium Pay	0
Nonpermanent	1	1	Annual Benefits	66,489
			Less 1.89% Vacancy Factor	(3,507)
			Lump Sum Premium Pay	0
Totals	3	3	Total Personal Services	182,400

Position Classification Summary

Job Class Title	Anchorage	Fairbanks	Juneau	Others	Total
Natural Resource Spec II	2	1	0	0	3
Totals	2	1	0	0	3